No. 18-6210

In The Supreme Court of the United States

GERALD P. MITCHELL,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Wisconsin

BRIEF OF AMICI CURIAE LEAGUE OF WISCONSIN MUNICIPALITIES, WISCONSIN TOWNS ASSOCIATION, AND CITY OF EAU CLAIRE IN SUPPORT OF RESPONDENT

DOUGLAS HOFFER
Deputy City Attorney
Counsel of Record
CITY OF EAU CLAIRE
203 S. Farwell Street
Eau Claire, WI 54701
(715) 839-6006
douglas.hoffer@eauclairewi.gov

CAROL NAWROCKI
Legal Counsel
WISCONSIN TOWNS ASSOCIATION
W7686 County Road MMM
Shawano, WI 54166
(715) 526-3157
carol.nawrocki@wisctowns.com

CLAIRE SILVERMAN
Legal Counsel
LEAGUE OF WISCONSIN MUNICIPALITIES
131 W. Wilson, Suite 505
Madison, WI 53703
(608) 267-2380
cms@lwm-info.org

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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INTEREST OF *AMICI CURIAE*[1]

The League of Wisconsin Municipalities was created on December 14, 1898 to help Wisconsin cities and villages share ideas and learn from one another, to train and provide information to the people elected and appointed to govern those cities and villages, and to advocate on their behalf with the Wisconsin Legislature, Governor, and state agencies. Many of the League's members investigate and prosecute impaired driving offenses.

The Wisconsin Towns Association is a statewide, voluntary, non-profit and non-partisan association of member town and village governments that provides education, legal information, and grassroots legislative advocacy to Wisconsin towns and villages. A number of the Association's members investigate and prosecute impaired driving offenses.

The City of Eau Claire is Wisconsin's ninth largest city. The City of Eau Claire investigates and prosecutes hundreds of impaired driving cases each year.

Amici curiae have a strong interest in ensuring that courts interpret the United States Constitution in a manner that allows Wisconsin villages, cities, and towns to protect its citizens from the serious danger

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[1] Blanket consent from both parties to the filing of *amicus* briefs have been filed with the Clerk. No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than *amicus curiae* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

posed by impaired driving, while at the same time protecting important civil liberties.

The communities represented by *amici curiae* expend significant resources addressing impaired driving. These communities seek clear guidance that provides reasonable opportunities for law enforcement to gather necessary evidence in impaired driving cases.

SUMMARY OF THE ARGUMENT

The Court should provide clear rules to law enforcement agencies across the country attempting to gather evidence necessary to investigate and prosecute impaired driving violations while also protecting important civil liberties. Current rules are not sufficiently clear.

The Court should overrule *McNeely* and determine that the natural dissipation of alcohol and drugs constitutes a per se exigency permitting warrantless blood draws. *McNeely* lacks clear guidance for law enforcement, involved four separate opinions, and did not sufficiently consider the impact of the rules it articulated on drug impaired driving investigations. Circumstances in impaired driving cases are often typical, and the Court should provide clear guidance on how police should handle them.

The *McNeely* approach leads to delays which result in evidence destruction, confusion for law enforcement and courts on what the *McNeely* standard

permits, and simultaneously provides little judicial oversight. The minimal judicial oversight provided in most cases does not justify the inevitable destruction of relevant evidence, the increased litigation the confusing *McNeely* standard creates, and the burden placed on the judiciary (particularly in rural areas with few judges).

Overruling *McNeely* will eliminate the need for the Court to consider the implied consent law issue in this case. If the Court examines the implied consent issue, it should adopt the State of Wisconsin's recommended approach and determine that the implied consent law's application to an unconscious driver is valid either as a consent search, or as a reasonable condition to combat intoxicated driving.

In the alternative, the Court should adopt the standard articulated in Chief Justice Roberts' opinion in *McNeely*. If a police officer reasonably believes he or she cannot obtain a blood draw warrant without delaying the blood draw, that constitutes an exigency permitting a warrantless blood draw.

Adopting a per se exigency standard in impaired driving cases reasonably considers the importance of timely blood draws in drug impaired driving cases. It also recognizes that it can be difficult for police officers to precisely determine what combination of alcohol and drugs an impaired driving suspect has consumed, especially where the suspect, like the suspect in this case, is unconscious.

A decision in favor of Mitchell will likely invite further litigation and confusion, particularly in Wisconsin, the only state with civil impaired driving violations.

ARGUMENT

I. The Court can provide clear, reasonable rules to law enforcement and courts across the country.

Reasonableness is always the touchstone of Fourth Amendment analysis. *See Brigham City v. Stuart*, 547 U.S. 398, 403, 126 S.Ct. 1943 (2006). The Court should provide clear rules that reasonably weigh law enforcement's ability to gather necessary evidence of impaired driving against important civil liberties.

Impaired driving is a crisis in this country. Removing impaired drivers from the road when they are impaired does not end the threat. The high volume of repeat impaired drivers is due to the high volume of people addicted to drugs and alcohol. Impaired driving enforcement is not only about ensuring justice and eliminating the immediate threat. It is also about helping to ensure that people struggling with addiction get resources they need, but may not voluntarily accept without a court order so that reductions in repeat impaired driving can occur.

A. The Court should overrule *McNeely*, which allows evidence destruction while providing little judicial oversight.

The Court should overrule *McNeely* and determine that the natural dissipation of alcohol and drugs constitutes a per se exigency permitting warrantless blood draws. *McNeely* lacks clear guidance for law enforcement and courts, involved four separate opinions, and did not sufficiently consider the impact of the rules it articulated on drug impaired driving cases. *See Missouri v. McNeely*, 569 U.S. 141, 166-67, 133 S.Ct. 1552 (2013) (Roberts, C.J., concurring in part and dissenting in part) (noting that despite the often "typical" circumstances in drunk driving cases, a police officer reading *McNeely* "would have no idea – no idea – what the Fourth Amendment requires of him . . . "). *Amici curiae* do not believe adopting a per se exigency approach requires overruling *Birchfield* which examined different issues.

The *McNeely* approach leads to blood draw delays which result in evidence destruction while simultaneously providing little judicial oversight. *See McNeely*, 569 U.S. at 180-81 (Thomas, J., dissenting) ("The Court's judgment reflects nothing more than a vague notion that everything will come out right most of the time so long as the delay is not too lengthy."); *see also Brigham City*, 547 U.S. at 403 (noting warrantless searches are permissible to "prevent the imminent destruction of evidence"). The minimal judicial oversight provided in most cases does not justify the inevitable destruction of relevant evidence, as well as the burden

placed on the judiciary (particularly in rural areas with few judges). *See* Jessica Miller & Aubrey Wieber, *Warrants approved in just minutes: Are Utah judges really reading them before signing off?*, Salt Lake Trib., January 14, 2016.

Overruling *McNeely* will eliminate the need for the Court to consider whether Wisconsin's implied consent law applied to unconscious drivers is valid as either a consent search or as a reasonable condition to combat drunk driving, although *amici curiae* agree with the State of Wisconsin's position on these issues. *See Birchfield v. North Dakota*, 136 S.Ct. 2160 (2016) (Thomas, J., dissenting) ("The better (and far simpler) way to resolve these cases is by applying the per se rule that I proposed in *McNeely*. Under that approach, both warrantless breath and blood tests are constitutional because 'the natural metabolization of [BAC] creates an exigency once police have probable cause to believe the driver is drunk. It naturally follows that police may conduct a search in these circumstances.'"). Circumstances in impaired driving cases are often typical, and the Court should offer clear guidance on how police should handle them.

Factors supporting overruling *McNeely* include the divided nature of the decision which calls the decision into doubt; no serious reliance interests have built up around the decision; and the decision is wrongly decided, it produces general injustice, and less harm will result from overruling the decision and providing clear rules than from allowing it to stand. *See* Bryan A. Garner, et al., *The Law of Judicial Precedent*, 388-403

(2016); *Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597 (1991) (noting the narrow margins and spirited dissents in overruling two recent cases).

In the alternative, the Court should adopt the standard articulated in Chief Justice Roberts' opinion in *McNeely*. *See McNeely*, 569 U.S. at 166-67 (Roberts, C.J., concurring in part and dissenting in part). If a police officer reasonably believes he or she cannot obtain a blood draw warrant without delaying the blood draw, that constitutes an exigency permitting a warrantless blood draw.

A typical impaired driving case involves something similar to the following facts which lend themselves to clear standards. Police officers observe a traffic violation or respond to a crash. In making contact with the driver, police officers observe signs of impairment such as slurred speech, bloodshot or glassy eyes, the odor of intoxicants, slow reaction times, lack of coordination, or other behavior suggesting impairment. Police officers may observe evidence of alcohol or drugs in the motor vehicle or on the impaired driving suspect's person. Sometimes citizen witnesses observe and report bad driving or signs of impairment to the police.

Based on observations of bad driving and indicia of impairment, police officers typically ask the defendant to perform standardized field sobriety tests to observe other signs of impairment. Prior to requesting field sobriety tests, police officers typically first request a backup officer to respond to the scene. Backup

officers ensure the primary officer and the impaired driving suspect's safety from oncoming traffic as most field sobriety tests are administered roadside. Depending on the traffic stop or accident's location, other officers' availability, and other variables, waiting for backup can sometimes create delays, particularly in rural areas. *See* Taylor Holt, *Douglas Co. Officials explain why Jayme Closs response took so long*, https://www.weau.com/content/news/Douglas-Co-Officials-explain-why-Jayme-Closs-response-took-so-long-504430552.html (noting it took 30 minutes for law enforcement to arrive at scene where citizen witnesses found kidnapping victim that was part of nationwide law enforcement search despite officers traveling over 100 mph because of the location's rural nature and road conditions).

After administering field sobriety tests, police officers often request the driver submit to a roadside preliminary breath test. A roadside preliminary breath test is generally admissible for probable cause determinations, but the test result is generally not admissible at trial. Wis. Stat. § 343.303. Police officers also consider roadside preliminary breath test results to determine if impairment might be based on drug use rather than alcohol use. Significant impairment accompanied by a low blood alcohol concentration often indicates drug use. If the totality of the circumstances demonstrates impairment the driver is placed under arrest.

After the driver is placed under arrest he or she is given the opportunity to submit to a chemical test of

his or her blood, breath, or urine. Law enforcement agencies typically get to choose which test an impaired driving suspect takes first, and most law enforcement agencies have a primary test they offer most alcohol impaired driving suspects. The suspect typically has the opportunity to request another test in addition to the law enforcement agency's primary test. Some law enforcement agencies, such as the City of Eau Claire, choose blood as a primary test because it is considered the most reliable test for both drugs and alcohol, and because timely blood draws are critical to drug impaired driving investigations.

If a roadside preliminary breath test result showed a sufficiently high blood alcohol concentration, and the law enforcement agency's primary test is breath, then the police officer will typically request an evidentiary breath test (or a urine test, although urine tests are infrequently used in impaired driving cases). If there is significant impairment and the roadside preliminary breath test result is low, suggesting the impairment is drug related, or if the officer has gathered evidence suggesting drug impairment, or if the law enforcement agency's primary test is blood, then the police officer will request an evidentiary blood test.

If the impaired driving suspect refuses to submit to a test, and the impaired driving violation is not a civil violation, the police officer will attempt to obtain a warrant to obtain a blood sample from the suspect. If the impaired driving violation is a civil violation, the police typically will not apply for a blood draw warrant, and will instead simply charge the defendant with a

civil refusal charge. A civil refusal counts as an impaired driving conviction in Wisconsin. Not surprisingly, police officers request most blood draw warrants late at night, during early morning hours, and on weekends, which can be burdensome in rural counties with a single or few judges available. Typically the amount of evidence supporting probable cause for arrest and the blood draw warrant is overwhelming.

Unconscious impaired driving suspects present various challenges. If an impaired driving suspect is unconscious, like Mitchell in the present case, then a breath or urine test is not possible, and the only option is an evidentiary blood test. An unconscious impaired driving suspect also cannot typically provide a roadside preliminary breath test sample, which makes it more difficult to ascertain if his or her impairment is due to alcohol, drugs, or some combination of intoxicants.

Impaired driving investigations involving accidents or injuries can provide additional variables and challenges for investigating officers not listed above.

1. The Court should adopt clear rules.

The Court should adopt the following clear rules. First, the Court should determine that the natural dissipation of alcohol and drugs constitutes a per se exigency permitting warrantless blood draws when probable cause to arrest an impaired driving suspect exists. This rule provides a bright line that law enforcement and courts can easily understand, and ensures

that necessary evidence is not destroyed. *See Birchfield*, 136 S.Ct. at 2196-98 (Thomas, J., dissenting). Any delay in drawing blood is critical in drug impaired driving cases. Delays can also critically impact cases where repeat drunk drivers cannot drive with a blood alcohol concentration at or above .02, in cases that implicate higher threshold penalties for driving with a blood alcohol concentration above .15, and a variety of other circumstances.[2]

Adopting this rule would also leave sufficient remedies in place if law enforcement takes a warrantless blood sample without probable cause. Defendants would retain the ability to move to suppress the blood evidence, and also retain the ability to file civil rights lawsuits against the law enforcement agency that improperly took a warrantless blood sample. These remedies provide sufficient incentive for law enforcement to perform their duties consistent with legal requirements.

Second, in the alternative, the Court should adopt the standard articulated in Chief Justice Roberts' opinion in *McNeely*. If a police officer reasonably believes he or she cannot obtain a blood draw warrant without delaying the blood draw, that constitutes an exigency

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[2] Adopting this rule would eliminate the need for the Court to engage in the implied consent analysis in this case. However, if the Court examines the implied consent issue, it should adopt the State of Wisconsin's recommended approach and determine that the implied consent law's application to an unconscious driver is valid either as a consent search, or as a reasonable condition to combat intoxicated driving.

permitting a warrantless blood draw. Simply put, no rule which permits evidence destruction in impaired driving cases is reasonable or consistent with the Court's jurisprudence on the imminent destruction of evidence constituting an exigency. *See Brigham City*, 547 U.S. at 403; *see also McNeely*, 569 U.S. 141 at 176-82 (Thomas, J., dissenting) (noting that "[e]ven a slight delay may significantly affect the probative value in borderline cases of suspects who are moderately intoxicated or suspects whose BAC is near a statutory threshold that triggers a more serious offense."). If the Court is unwilling to adopt a per se exigency bright line standard, it should adopt a rule stating if a police officer reasonably believes he or she cannot obtain a blood draw warrant without delaying the blood draw, that constitutes an exigency permitting a warrantless blood draw.

B. Adopting a per se exigency standard in impaired driving cases reasonably considers the importance of timely blood draws in drug impaired driving cases.

The Court should adopt clear and reasonable rules that sufficiently consider the importance of maintaining the best evidence in drug impaired driving cases. Blood draw delays in drug impaired driving cases can significantly frustrate the ability to prosecute or defend the case because most drugs are not eliminated from the human body at a linear rate similar to alcohol. The non-linear elimination of drugs makes it

extremely difficult to extrapolate backwards and estimate drug concentration at the time of driving.

Drug impaired driving is a growing problem in the United States, and studies suggest up to 22% of drivers involved in accidents use drugs, often in combination with alcohol. *See* Sarah Kerrigan, *Drug Toxicology for Prosecutors*, American Prosecutors Research Institute, 2004, https://ndaa.org/wp-content/uploads/drug_toxicology_for_prosecutors_04.pdf; *see* Fernando A. Wilson, et al., *Fatal Crashes from Drivers Testing Positive for Drugs in the U.S., 1993-2010*, 129 Pub. Health Rep. 342 (2014); Erin Allenman, *Why Your Fourth Amendment Rights Don't Matter: How Birchfield Overlooks the Testing of Drugged Drivers*, 28 Widener Commw. L.Rev. 105 (2019); *see also* Center for Disease Control and Prevention: *Impaired Driving: Get the Facts*, https://www.cdc.gov/motorvehiclesafety/impaired_driving/impaired-drv_factsheet.html. The Institute for Behavior and Health estimates that drugged driving causes 20% of automobile crashes, which translates into 8,600 deaths, 580,000 injuries, and $33 billion in property damage each year in the United States. IBH Public Policy Statement 1 (citing Substance Abuse & Mental Health Servs. Admin., Results from the 2007 National Survey on Drug Use and Health: National Findings (2008), http://oas.samhsa.gov/nsduh/2k7nsduh/2k7results.pdf).

Marijuana use and marijuana impaired driving are increasing. The most recent national data found marijuana present in 12.2% of all fatally injured drivers tested for drugs. Allenman at 105. As states

continue to legalize medical and recreational marijuana, an increase in marijuana related impaired driving is likely, and the Centers for Disease Control and Prevention reports that 13% of nighttime and weekend drivers have marijuana in their system. Center for Disease Control and Prevention: *Impaired Driving: Get the Facts*, https://www.cdc.gov/motorvehiclesafety/impaired_driving/impaired-drv_factsheet.html. The National Highway Traffic Safety Administration ("NHTSA") reported an increase in the number of drivers using marijuana or other illegal drugs from 2007 to 2015. Allenman at 117.

In addition to marijuana, increases in other impairment causing drugs exist. In 2017, the United States Department of Health and Human Services declared opioid abuse to be a "public health emergency." U.S. Department of Health and Human Services, *What is the U.S. Opioid Epidemic?* https://www.hhs.gov/opioids/about-the-epidemic/index.html. Each day, 91 people die from opioid overdoses. *Id.* Not surprisingly, a recent study concluded that prescription opioid use is associated with increased risk of involvement in a fatal two-vehicle crash, due in large part to a failure to stay in the proper lane. Stanford Chihuri, Guohua Li, *Use of Prescription Opioids and Initiation of Fatal 2-Vehicle Crashes*, https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2724775. Millions of drivers in the United States take licit and illicit drugs before driving. Tina Wescott Cafaro, *Slipping Through the Cracks: Why Can't We Stop Drugged Driving*, 32 W.New. Eng. L.Rev. 33, 35 (2010); Substance Abuse &

Mental Health Servs. Admin., U.S. Dept. of Health & Human Servs., Results from the 2006 National Survey on Drug Use and Health, National Findings 2 (2007), http://oas.samhsa.gov/nsduhl/2k6nsduh/2k6results.pdf.

Hazardous inhalants and volatile substances are another growing area of impaired driving, and chemical evidence of these substances only stay in a user's system for a short time. *See* R.J. Flanagan, et al., *Volatile Substance Abuse, Practical Guidelines for Analytical Investigation of Suspected Cases and Interpretation of Results*, United Nations Office on Drugs and Crime, https://www.unodc.org/pdf/technical_series_1997-01-01_1.pdf (noting an estimate that 7 to 12% of American high school students have used volatile substances, that about 4% use volatile substances regularly, that volatile substances can produce central nervous system effects similar to those of other sedatives, and that volatile substances can induce more profound effects such as delusions and hallucinations); *see also* Eric Lindquist, *Wisconsin Girl Scouts' crash death puts spotlights on dangers of 'huffing'*, Twin Cities Pioneer Press, November 22, 2018, https://www.twincities.com/2018/11/22/wisconsin-girl-scouts-crash-death-puts-spotlights-on-dangers-of-huffing/ (In discussing a Chippewa Falls, Wisconsin case involving a hazardous inhalant impaired driver who killed three Girl Scouts and a mother as they were picking up trash along a county highway, noting that chemical evidence of "huffing" volatile substances only stays in the user's system for a short time.).

Driving is a complex task which involves coordination, reaction time, tracking, judgment, divided attention, and perception. Kerrigan at 3. Drugs which impact mental or physical processes can impair the ability to safely operate a motor vehicle.

Prosecuting drug impaired drivers is a daunting task. *Id.* at v. Drugs are often used in combination with alcohol or other drugs, and precisely diagnosing drug related impairment can be far more complicated than alcohol related impairment because different drugs and drug combinations have different signs and symptoms. *Id.* at 5. Police officers may observe clear impairment, but determining what drug, drug combination, or drug and alcohol combination a drug impaired driving suspect is under the influence of, is challenging without a timely blood test.

Drug classes include depressants, stimulants, opioids (narcotics), or hallucinogens. These classes can be further subdivided, based upon the intended use of the drug. *Id.* at 11. Different drugs and drug combinations (including alcohol) have different signs and symptoms. *Id.* at 12, 23-25 (noting a variety of different signs and symptoms for various drugs). For example, some drugs such as depressants slow reflexes and slur speech similar to alcohol, while some drugs such as stimulants increase blood pressure and excitation. *Id.* The increased and prevalent use of alcohol in combination with other drugs, along with the fact that many drugs share signs and symptoms with alcohol, creates additional challenges for impaired driving

investigation and prosecution, particularly without timely blood draws. *See* Kerrigan at 4.

Some drugs have the potential to impair driving performance for extended periods, while others may impair during the "crash" phase, during which time an individual's drug concentration may be decreasing or very low. *Id.* at 4.

Different drugs and drug combinations, as well as hazardous inhalants or volatile substances, may involve different absorption, distribution, metabolism, and elimination in the human body. *Id.* at 11-20. Alcohol is typically eliminated from the human body in a *linear* rate which means that the body eliminates it at a relatively constant amount per unit of time. *Id.* at 16. Conversely, most drugs are eliminated in a *non-linear* rate, and are thus characterized by a variable half-life which makes it extremely difficult to extrapolate backwards from a known drug concentration to some earlier time and concentration. *Id.*

Toxicologists testifying about the effects of drugs on a particular individual often adopt a multi-strategy approach to interpretation. *Id.* at 13. Analytical test results demonstrating the presence and quantity of a drug or its metabolite in a biological sample are critically important, and often need to be supplemented by performance on psychophysical tests, values obtained in physiological assessments, unusual behaviors, statements, and other observations. *Id.* at 8.

The gold standard in testing drivers for drugs is a blood test. Allenman at 123. Blood tests are very

reliable because they reflect recent use and indicate which drugs are circulating in the body at the time the blood is drawn. Allenman at 123. The closer blood is withdrawn to the time of driving, the greater the interpretative value the test result will have. Kerrigan at 33. Blood tests are currently the least intrusive reliable method of testing what drugs are in an impaired driving suspect's body at the time of driving. *Id.* at 33-37.

Any rule that delays law enforcement's ability to obtain a blood sample leads to evidence destruction. Delays in obtaining drug related evidence are especially problematic because most drugs are not eliminated from the human body at a linear rate which makes it difficult to extrapolate backwards and estimate drug concentration at the time of driving. In some cases, delays in obtaining a blood test can result in the complete destruction of relevant drug related evidence.

The Chippewa Falls case referenced above is instructive on the potential harm caused by delays drawing blood. *See* Lindquist. The defendant "huffed" hazardous inhalants/volatile substances, became disoriented, and drove off the road killing three Girl Scouts and one mother. Because hazardous inhalant evidence and hazardous inhalant impairment can disappear so quickly, any delay in drawing the defendant's blood could lead to destroying all evidence of hazardous inhalants in the blood stream. Fortunately, after leaving the scene of the accident, the defendant's passenger admitted he and the driver were impaired due to hazardous inhalants, and the defendant eventually

admitted the same. Law enforcement should not have to depend exclusively on confessions to bring impaired drivers to justice. Conversely, timely blood draws give defendants the best evidence to defend themselves.

Adopting a per se rule recognizes it is not always possible for law enforcement officers observing impairment to distinguish between alcohol impairment and impairment based on a combination of alcohol and drugs, particularly in cases involving unconscious impaired driving suspects. Observing an odor of intoxicants, slurred speech, and other standard alcohol indicia of impairment does not rule out the possibility of drug use in combination with alcohol. The natural dissipation of drugs, the unpredictable nature of that dissipation, and the challenging nature of drug impaired driving prosecution without precise drug concentrations at the time of driving, constitutes a categorical exigency resulting in an exception to the warrant requirement.

C. A decision in favor of Mitchell may impact civil impaired driving cases.

A decision in favor of Mitchell may negatively impact civil impaired driving cases. In Wisconsin most first offense impaired driving violations are charged as a civil forfeiture similar to a traffic ticket, an approach Justice Blackmun criticized in a concurring opinion issued in 1984. *See Welsh v. Wisconsin*, 466 U.S. 740, 755-56, 104 S.Ct. 2091 (1984) (Blackmun, J., concurring) (comparing Wisconsin's decision to charge first offense

OWI violations as a civil violation to an "indulgent parent" hesitating to "discipline the spoiled child"). The Wisconsin legislature crafted an approach which requires ignition interlock devices for OWI cases involving high blood alcohol concentration cases and repeat OWI convictions, requires alcohol or drug abuse assessments and other addiction resources, quickly imposes administrative penalties, and carries significant jail and prison sentences for repeat offenders. While reasonable minds may disagree on the best legislative approach to this serious problem, the Court should be mindful of the impact a decision in this case may have on Wisconsin civil OWI cases.

A decision which precludes warrantless blood draws of unconscious OWI suspects will likely result in unconscious civil OWI defendants challenging the validity of (civil) blood draw warrants. Unconscious drivers will likely assert that the intrusion of a blood draw for a civil traffic citation contradicts constitutional principles. Wis. Stat. § 968.13 permits blood draw warrants for civil OWI offenses, but the validity of search warrants in the civil context is complicated, and will likely invite further litigation. *See Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523 (1967) (discussing when warrantless searches authorized by law are consistent with Fourth Amendment requirements).

After the Court issued the *McNeely* decision, most Wisconsin communities stopped applying for blood draw warrants on civil OWI cases in part to avoid creating more impaired driving litigation, especially

because a civil refusal charge constitutes an OWI conviction.

The Court should consider how a decision in favor of Mitchell might impact civil OWI enforcement in Wisconsin. If warrantless blood draws of unconscious drivers are not permissible, and blood draw warrants are unavailable for civil OWI offenses, Wisconsin will not be able to obtain blood evidence for unconscious civil OWI defendants. Regardless of whether these challenges are successful, they will likely lead to more impaired driving related litigation.

CONCLUSION

For the foregoing reasons, the judgment of the Wisconsin Supreme Court should be affirmed.

Respectfully submitted,

DOUGLAS HOFFER
Deputy City Attorney
Counsel of Record
CITY OF EAU CLAIRE
203 S. Farwell Street
Eau Claire, WI 54701
(715) 839-6006
douglas.hoffer@eauclairewi.gov

CAROL NAWROCKI
Legal Counsel
WISCONSIN TOWNS ASSOCIATION
W7686 County Road MMM
Shawano, WI 54166
(715) 526-3157
carol.nawrocki@wisctowns.com

CLAIRE SILVERMAN
Legal Counsel
LEAGUE OF WISCONSIN MUNICIPALITIES
131 W. Wilson, Suite 505
Madison, WI 53703
(608) 267-2380
cms@lwm-info.org

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